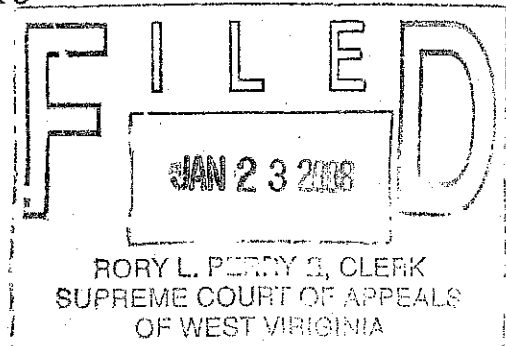


33895

DARNELL A. ALLEN, JR.
Mt. Olive Correctional Complex
1 Mountainside Way Box 5
Mt. Olive, WV 25185

January 22, 2008

Rory L. Perry, II., Clerk
WV Supreme Court of Appeals
1900 Kanawha Boulevard East
State Capitol, Building 1, Room E-317
Charleston, WV 25305



Re: Allen vs. McBride, Habeas Corpus Civil Case #06-C-118
in Mineral County Circuit Court Pursuant to Zain III Ruling.

Dear Mr. Perry:

I submitted this legal correspondence with all due respect to request that your office and the Honorable Court please accept this typewritten submission as my *pro se* Petition for a Writ of Mandamus pursuant to *W. Va. Code § 51-1-3* and based upon the following facts and reasons proffered below:

On June 16, 2006, the West Virginia Supreme Court of Appeals entered and filed the ruling commonly known as Zain III cited as *In Re: Renewed Investigation of the State Police Crime laboratory, Serology Division*, 633 S.E.2d 762 (2006). This ruling by law permitted me to file a Secondary Petition for a Writ of Habeas Corpus to re-address the serology issues in my case because not only am I convicted between 1979 and 1999 but the WV State Police Crime Lab forensic scientists, chemists and technicians who tested evidence and testified about it are not named Fred S. Zain.

Subsequently on October 20, 2006, the Circuit Court of Mineral County accepted and filed my *pro se* Petition for a Writ of Habeas Corpus Ad-Subjiciendum pursuant to the WV Supreme Court of Appeals ruling titled *In Re: Renewed Investigation of the State Police Crime laboratory, Serology Division*, 633 S.E.2d 762 (2006). In fact, my *pro se* habeas petition is filed pursuant to Zain III ruling, the WV Post-Conviction Habeas Corpus Act promulgated by the Supreme Court of Appeals by order dated December 13, 1999, and in compliance with *W. Va. Code § 53-4A-1*.

Additionally, on November 12, 2007, and approximately thirteen (13) months after the filing of my *pro se* habeas petition, I mailed correspondence to the lower tribunal requesting whether or not a public defender had been appointed to represent me. However the Honorable Andrew Frye, Judge, and Mary Margaret Rienhart, Clerk, of the Circuit Court of Mineral County did not respond to my *pro se* habeas petition or my written request which happened to be my second written request seeking the status of my case in the past fifteen (15) months to date.

Now I must point out that not only does my case meet the criteria meted out by the Justices pursuant to the Zain III ruling cited above, but § 17 of Article III of the West Virginia Constitution provides that "justice shall not be administrated without sale, denial or delay." Further, Canon 3B(8) of the West Virginia Code of Judicial Conduct provides that [a] judge shall dispose of all judicial matters promptly, efficiently and fairly." Also the Supreme Court of Appeals pointed out that "judges have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission" Syl. Pt. 1, in part, *State ex rel. Patterson v. Aldredge*, 173 W.Va. 446, 317 S.E.2d 805 (1984). Moreover, Rule 16.12 of the WV Trial Court Rules provides that a "final judgment or degree shall be entered in extraordinary... proceedings within one month of submission." Not to mention the fact that the June 16, 2006, Zain III ruling requires all the circuit court judges to promptly address habeas petitions filed in their jurisdiction by appointing counsel, ordering the testing of evidence, and holding a full evidentiary hearing on the serology issues etc...

In applying the aforementioned provisions, the Supreme Court of Appeals held in Syl. Pt 2 of *State ex rel. Patterson v. Aldredge, supra*: "Mandamus will not lie to direct the manner in which a trial court should exercise its discretion with regard to an act either judicial or quasi-judicial, but a trial court, or other inferior tribunal, may be compelled to act in a case it unreasonably neglects or refuses to do so." *State ex rel. Cackowska v. Knapp*, 147 W.Va. 699, 130 S.E.2d 204 (1963).

In conclusion, I humbly request this Honorable Court to promptly consider granting unto me a Rule of Mandamus on my behalf to be directed against the Respondent - Honorable Andrew Frye, Judge, to compel the Circuit Court of Mineral County to immediately appoint legal counsel with expertise in serology evidence issues to represent me, and, to file an Amended Petition for a Writ of Habeas Corpus, Memorandum of Law, and all other required pleadings. Furthermore, I must respectfully request the Honorable Court to direct the Respondent to order the physical serological exemplars, evidence, the test result by-products, such as: the ABO, RFLP or PCR testing reports, photographs, microscopic slides, as well as any scientific bench notes, and any relevant physical evidence, data and documents be inventoried, and preserved by the State in the presence of counsel until such time as my Amended Petition for a Writ of Habeas Corpus can be scheduled on the Respondent's docket for a full Omnibus Evidentiary hearing pursuant to *In Re: Renewed Investigation of the State Police Crime laboratory, Serology Division*, 633 S.E.2d 762 (2006). Besides this the Respondent must be directed to enter a scheduling order for both parties to strictly abide to, and, to schedule a omnibus evidentiary hearing to address the serology evidence and issues raised in my case pursuant to the Zain III ruling and for such other relief deemed appropriate, just, fair and necessary in the instant case at bar before this Honorable Court.

Finally, I want to thank you for your precious time and cooperation in this matter. Also if you have any questions or instructions please feel free to contact me at the above mailing address so I can assist in resolving this legal matter without delay. God-speed!

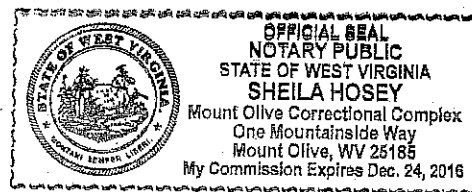
Sincerely,



Darnell A. Allen, Jr.

DAA/dd
Enclosures

cc: Hon. A. Frye, (J) Respondent
file



Sheila Hosey
January 22, 2008

DARNELL A. ALLEN JR.
c/o Mt. Olive Correctional Complex
1 Mountainside Way
Mt. Olive, WV. 25185

October 17, 2006

*06 C118 - Case Number
Judge Andrew Frye*

Mary M. Rinehart, Circuit Clerk
Mineral County Courthouse
150 Armstrong Street.
Keyser, WV. 26726

RE: ALLEN V. MCBRIDE

Dear Ms. Rinehart:

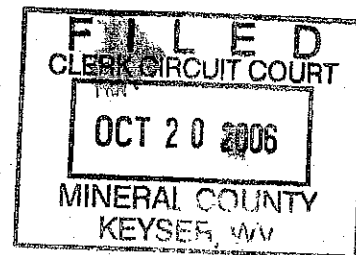
Enclosed herewith please find the original and three (3) copies of the Petitioner's Petition for Writ of Habeas Corpus Subjiciendum for filing in the Circuit Court. Please return the third copy to me with the assigned case number and Circuit Court stamp.

A copy of the Petition was mailed to the Respondent's on this date.

Respectfully,



Darnell A. Allen Jr.
Petitioner Pro-se

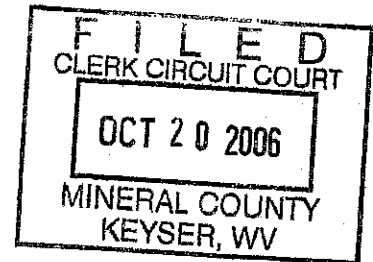


IN THE CIRCUIT COURT OF
MINERAL COUNTY, WEST VIRGINIA

DARNELL ALLEN JR.,
Petitioner,

VS.

THOMAS MCBRIDE, Warden,
Mt. Olive Correctional Complex
Respondent



PETITION FOR WRIT OF HABEAS CORPUS SUBJICIENDUM

Comes now the petitioner Darnell A. Allen Jr., (hereinafter "petitioner"), Pro se and submits to this Honorable court his petition for writ of Habeas Corpus subjiciendum. Petitioner alleges as follows:

JURISDICTION

Jurisdiction is conferred upon this court pursuant to WV. code 53-4A-1. Petitioner further relies on the West Virginia Supreme Court of Appeals recent decision of special Judge, Honorable Thomas A. Bedell, "IN THE MATTER OF: RENEWED INVESTIGATION OF THE STATE POLICE CRIME LABORATORY, SEROLOGY DIVISION."

STANDARD OF REVIEW

Although it is a violation of due process for the state to convict a defendant based on false evidence, such conviction will not be set aside unless it is shown that the false evidence had a material effect on the jury verdict."

Syllabus Point 2, Matter of W.V. State Police crime Lab., 190 W.V. 321, 438 S.E. 2d 501 (1993).

"Serology reports prepared by employees of the serology division of the West Virginia State Police crime Laboratory, other than Trooper Fred S. Zain, are not subject to the invalidation and other strictures contained in the matter of an investigation of the West Virginia State Police crime Laboratory, Serology Division, 190 WV. 321, 438 S.E. 2d 501 (1993)." Syllabus point 3, Matter of W.V. State police crime Laboratory, 191 W.V. 224, 445 S.E. 2d 165 (1994).

"A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules:

(1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence

satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. Syllabus Point 1 **HALSTEAD V. HORTON**, 38 W.V. 727, 18 S.E. 953 (1894).

Syllabus, **STATE V. FRAZIER**, 162 W.V. 935, 253 S.E. 2d 534 (1979).

A prisoner against whom a West Virginia State Police Crime Laboratory serologist, other than Fred Zain, offered evidence and who challenges his or her conviction based on the serology evidence is to be granted a full habeas corpus hearing on the issue of the serology evidence. The prisoner is to be represented by counsel unless he or she knowingly and intelligently waives that right. The circuit court is to review the serology evidence presented by the prisoner with searching and painstaking scrutiny. At the close of the evidence, the circuit court is to draft a comprehensive order which includes detailed findings as to the truth or falsity of the serology evidence and if the evidence is found to be false, whether the prisoner has shown the necessity of a new trial based on the five factors set forth in the syllabus of **STATE V. FRAZIER**, 162 W.V. 935, 253 S.E. 2d 534 (1979).

A circuit court that receives a petition for a writ of habeas corpus from a prisoner against whom a West Virginia State Police crime Laboratory serologist, other than Fred Zain, offered evidence, and whose request for relief is grounded on the serology evidence, is to hear the prisoner's challenge in as timely a manner as is reasonably possible. A prisoner who was convicted between 1979 and 1999 and against whom a West Virginia State Police crime Laboratory serologist, other than Fred Zain, offered evidence may bring a petition for a writ of habeas corpus based on the serology evidence despite the fact that the prisoner brought a prior habeas corpus challenge to the same serology evidence, and the challenge was finally adjudicated.

GROUND

(A) TROOPER HOWARD MYERS GAVE FALSE AND EVASIVE TESTIMONY IN THE WILBERT THOMAS CASE (THOMAS V. TRENT) AND WAS ALLOWED TO TESTIFY IN PETITIONER AND CO-DEFENDANT'S TRIAL.

Petitioner contends that Trooper Howard Myers (hereinafter "Myers"), gave false and evasive testimony in the Wilbert Thomas case and then was allowed to testify in petitioner's and co-defendant's trials. This should have never been allowed to happen. Had petitioner's trial lawyer been aware of this deception, then he could have questioned Myers as to why he admitted to lying in a previous case. This could have planted the seed of doubt to the trial jury and the outcome of the trial could have and most likely would have been different.

(B) THIS CONVICTION WAS OBTAINED BY THE UNCONSTITUTIONAL FAILURE OF THE PROSECUTION TO DISCLOSE EVIDENCE WHICH WAS FAVORABLE.


The state knew or should have known of the inconsistent and contradictory testimony of Myers in previous cases such as the Wilbert Thomas case. In a hearing on a petition for writ of habeas corpus held in the Circuit Court of Mineral County, W.V., February 2, 2004, the prosecution would have the court believe that Myers testified to what Zain had found and not what Myers had tested. (see habeas corpus hearing transcripts pg. 84-86). This is completely false. On April 28, 1999, the United States Magistrate Judge Jerry D. Hogg found that Trooper Myers admitted to using false testimony to obtain a conviction. If the defense would have been effective then the outcome of the trial could have and most likely would have been different.

Moreover, petitioner contends that this conviction was based on testimony by Trooper Myers of the serology division. Trooper Myers has a history of presenting false testimony as admitted in the Wilbert Thomas case. **THOMAS V. TRENT.**

RELIEF SOUGHT

Wherefore and since, for the reason stated herein, petitioner requests that he receive a thorough, timely and full review of challenges to the serology evidence after the appointment of counsel and amendment of the instant petition. Through the same, petitioner respectfully request that the court **FIND** that misconduct and false evidence of Trooper Myers denied him a fair trial in violation of the Due process Clause.

Respectfully Submitted,



Darnell A. Allen Jr.

VERIFICATION

State of West Virginia, county of Fayette, to wit:

Taken, sworn and subscribed to before me, the undersigned authority
this 17th day of October 2006.


Notary Public

CERTIFICATE OF SERVICE

I, Darnell Allen Jr., petitioner pro-se, do hereby certify that a true and correct copy of the foregoing petition for writ of habeas corpus subjiciendum was forwarded to counsel for the Respondent via U.S. Mail, postage pre-paid this 17th day of October, 2006. Addressed as follows:

Lynn Nelson, Prosecuting Attorney
office of the prosecuting attorney
Mineral County Courthouse
150 Armstrong street
Keyser, WV. 26726

